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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY 27 1997

Federal Communications Commission
Office of Secretary

In the matter of

TOLL FREE SERVICE ACCESS CODES

CC Docket No. 95-155

Petition to Modify 888 Number Allocation
Plan filed by LCI International, Inc.

NSD File No. 97-10

Petition to Modify 888 Number Allocation
Plan filed by UniDial, Inc.

NSD File No. 97-15

Petition to Modify 888 Number Allocation
Plan filed by Consolidated Communication
Telecom Services, Inc.

NSD File No. 87-16

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

ICB, Inc. ("ICB"), on behalf of itself and its clients, pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a), and Section 1.429(a) of the Commission's Rules and Regulations, 47 C.F.R. § 1.429(a), hereby petitions the Commission to reconsider and/or clarify certain aspects of the *Second Report and Order and Further Notice of Proposed Rulemaking* ("2nd R&O"), FCC 97-123, released 11 April 1997, 62 Fed. Reg. 20147-20148 (25 April 1997), in support whereof, the following is respectfully shown:

A. INTRODUCTION.

1. ICB, under the trade name ICB Toll Free Consultancy, is a consulting firm representing numerous toll free service users, such as telemarketers, calling centers and bureaus, shared use vendors, bundled service providers, etc. ICB's consulting clients also include several corporate marketers that are not otherwise involved in the telecommunications industry (*i.e.*, pure end users of toll free services). ICB is very active in the toll free industry as a participant in the Alliance for Telecommunications Industry Solutions, Inc. ("ATIS"), including, among other committees, the Service Management System/800 Number Administration Committee ("SNAC"). ICB publishes *ICB Toll Free News*, the leading trade publication on toll free issues, options, and alternatives for telecommunications

and marketing executives. ICB thus has a unique perspective on and knowledge of the issues in this proceeding.

2. ICB urges the Commission to reconsider that aspect of the *2nd R&O* which proscribes the private consensual transfer or exchange of toll free numbers between end users. This action is based on the erroneous belief by the Commission that the sale of toll free numbers causes or exacerbates a shortage in the number supply. ICB shows herein that the private transfer of numbers between end users does not significantly impact the supply of toll free numbers, and in fact serves the public interest by enhancing the value and utility of telecommunications services, increasing efficiency, facilitating competition, and promoting economic growth.

3. ICB further asks the Commission to modify the *2nd R&O* and clarify that certain practices and arrangements commonly used by end users, including telemarketers, shared use vendors, and bundled service providers, do not constitute prohibited "hoarding" within the meaning of the regulations. There are many legitimate business situations that require users to maintain an "inventory" of numbers that are arguably prohibited by the new rules. This clarification is necessary to give the industry some degree certainty as to what business practices are and are not permitted. ICB also asks the Commission to recognize and account for the anticompetitive incentives for RespOrg/Carrier's to warehouse numbers.

B. THE PRIVATE TRANSFER OF NUMBERS BETWEEN END USERS SERVES THE PUBLIC INTEREST.

4. The Commission, starting from the premise that "toll free numbers are a public resource [that must be] allocated efficiently and fairly,"¹ found that "brokering, which is the selling of numbers by private entities for a fee, is not in the public interest." *2nd R&O* at ¶ 38. The Commission bases this policy on its erroneous belief that brokering will accelerate depletion of the number supply, but there is

¹ Neither the "public resource" status of toll free numbers nor the policy that carriers and subscribers do not "own" the numbers requires a prohibition on private transfer of numbers for consideration. Telephone numbers are not unlike the radio spectrum in this regard. Section 301 of the Communications Act provides for the issuance of licenses "for the use ... but not the ownership" of portions of the electromagnetic spectrum. 47 U.S.C. § 301. This does not preclude the subsequent transfer or assignment of such licenses to other parties, often for substantial sums. If a statutory prohibition on ownership of radio spectrum does not preclude the for-profit sale of interests in Title III authorizations, then the regulatory policy against ownership of toll free numbers certainly does not preclude the transfer of such numbers between users. The question of "ownership" of telephone numbers thus is a red herring. Subscribers can and do gain a vested interest in certain numbers, a vested interest the Commission has recognized and deemed worthy of at least some degree of regulatory protection in the context of service provider portability. See n.10, *infra*.

no evidence in the record that the private exchange of numbers has any cognizable effect on the availability of toll free numbers. ICB submits, moreover, that the free transfer of numbers between end users is in the public interest.

5. Significantly, the Commission does not hold that the sale or transfer of numbers is a bad thing *per se*,² rather, brokering is prohibited because it "provides motivation for hoarding," which the Commission fears "would lead to the premature depletion of the supply of toll free numbers." *2nd R&O* at ¶ 38. The real culprit is hoarding, not brokering, but the Commission is concerned that merely "prohibiting ... hoarding will not fully eliminate the effects of hoarding." *Id.* The Commission theorizes that "[r]emoving the ability to sell a toll free number eliminates the incentive to hoard." *Id.* at n.155.³

6. The Commission points to absolutely no evidence, in the record or otherwise, that brokering has in the past or will in the future encourage hoarding. Instead, the Commission merely speculates that the ability to sell numbers provides an "incentive to hoard" *Id.* at n.155, or that "a subscriber *could* acquire a group of numbers it expected to sell at a later date" and "*could* then nominally place the numbers in service through 'dummy' affiliates." *Id.* at ¶ 38 (emphasis added). It is inappropriate to base this regulatory restriction on such speculative conclusions about what "could" happen, particularly when the effect of the measure is to proscribe legitimate activities that are beneficial to the public users of toll free service. If the Commission were to prohibit each and every activity that "might" be exploited in some untoward way, virtually all legitimate activities would be prohibited. The Commission must instead balance the public interest value of private transfers of numbers against its concerns about potential abuse.

7. The Commission's assumption that trafficking in vanity numbers is a significant source of the alleged number depletion is entirely unjustified and misdirected. There are other more obvious pressures on number supply that the Commission either fails to see or chooses to ignore. For example, a

² There is no statement anywhere in the *2nd R&O* that the private exchange of numbers is, in and of itself, contrary to the public interest, much less a demonstration of a rational basis for such a position. Moreover, the commercial marketability of numbers is undeniable, hence the Congressional initiative to auction the 888 set-aside numbers-- numbers that were, by the way, initially set aside on the theory that they would be reserved for replication of 800 vanity numbers.

³ The logic does not follow. If one were trafficking in numbers for profit, the incentive would be to sell the numbers as quickly as possible. To hoard numbers would be contrary to a toll free "profiteer" for at least two reasons: (a) there is a cost associated with holding numbers that are not actually being used, and (b) no profit can be realized on numbers that are held rather than sold.

1995 industry survey⁴ found that out of approximately 7.7 million potential 800 numbers,⁵ RespOrgs were serving only approximately 4.5 million working numbers. Where were the other 3.2 million numbers? They were not being hoarded or brokered by subscribers, because they were not being served by RespOrgs.⁶ But neither were they in the common SMS/800 database pool, if the information the industry was feeding the Commission was accurate.⁷ The only logical conclusion is that over 40% of the 800 number supply was being warehoused by RespOrg/Carriers.⁸ The Commission thus ignores "actual" warehousing by RespOrgs in its rush to stamp out "potential" hoarding by subscribers.

8. In focusing on imaginary brokers who may, theoretically, hoard large quantities of numbers for future sale, the Commission fails to recognize the realities of the market. The typical private exchange of a toll free number is a buyer-initiated transaction involving a single toll-free number. A company may decide, for example, that it would like to have the toll free number which spells out the company's brand name on the telephone keypad. In most cases the target toll free number will have already been assigned to a user. The company may then contact the existing user to negotiate a potential transfer of the number. This is a commercial transaction that depends entirely on the relative value of the number to the parties. If the value to the buyer of obtaining the number is greater than the value to the seller in retaining it, a transfer will occur. The Commission need not substitute its regulatory speculation for the competitive economic forces at play.

9. The private exchange or transfer of a toll free number has virtually no impact on the toll free number supply. The buyer hopes to obtain a number that is already assigned to and in use by the seller. Transferring rights in that number from one party to the other has absolutely no impact on the supply of unreserved and unassigned toll free numbers. Even if the seller obtains a replacement toll free number, there is no net adverse impact on the number supply, because it is reasonable to assume that

⁴ See Appendix B of SNAC's *Comments* in this docket. SNAC conducted the survey in response to an FCC request for information on the necessity and viability of 888 replication of 800 vanity numbers.

⁵ DSMI places the quantity of potential 800 numbers at 7,710,000.

⁶ A subscriber must establish a RespOrg relationship for the management of a toll free number.

⁷ As of June 1995 there were allegedly only approximately 600,000 toll free 800 numbers remaining in the common database assignment pool. *Notice of Proposed Rulemaking* (CC Docket No. 95-155) (FCC 95-419) at ¶ 8, 10 FCC Rcd 13692, 13694 (1995).

⁸ As the Commission is aware, most RespOrgs are also carriers, and virtually all of the large carriers are RespOrgs. In view of the undeniable value certain numbers have for subscribers, carriers have a strong incentive to warehouse numbers to use as enticements for large accounts. The dual roles of RespOrg and carrier present a conflict of interest that has anticompetitive consequences.

buyer would have taken an unreserved number if unable to make the deal. What we have, then, is a private transaction between two end users that allows them to make more beneficial use of toll free service. For the Commission to outlaw this is to throw out the baby of increased public value of toll free service along with the bath water of potential abuse.

10. Most transfers of toll free numbers between subscribers involve "vanity" numbers.⁹ In adopting policies requiring service provider portability,¹⁰ the Commission has already recognized and moved to protect the importance to subscribers of being able to maintain their existing telephone numbers notwithstanding changes in service providers. The Commission has also demonstrated its understanding that holders may gain a significant economic or commercial interest, hence value, in vanity numbers.¹¹ There is often just as much, and sometimes even more, value to the subscriber in being able to obtain a particular toll free number in the first instance, and this is no less deserving of Commission consideration. The use of vanity numbers enhances the value of toll free service to subscribers, makes use of the service by the public easier and more efficient, and promotes economic growth. The Commission's toll free policies therefore should provide for the ability of a subscriber to obtain a specific desired number, whether from the pool of unreserved numbers or from existing users of the number.

11. Acquiring a toll free number from an existing user is, as a practical matter, the only viable opportunity for a subscriber to choose a particular number. The substantial likelihood is that a desired number is already in use by another subscriber. In the vast majority of cases, the number will have been assigned randomly to the current holder, who will have no particular knowledge of or interest in the vanity number.¹² Even in the unlikely event that the desired number is not already in use, the odds

⁹ For purposes of this discussion, "vanity" numbers include not only those that correspond to some name or phrase to be spelled out on the telephone keypad, but also "any numbers in which the holders have a particular interest, be it economic, commercial, or otherwise." *Notice of Proposed Rulemaking* (CC Docket No. 95-155) at ¶ 35, 10 FCC Rcd at 13701-13702 (1995).

¹⁰ See *Telephone Number Portability* (CC Docket No. 95-116), First Report and Order and Further Notice of Proposed Rulemaking (FCC 96-286), 11 FCC Rcd 8352 (1996); and *Provision of Access for 800 Service* (CC Docket No. 86-10), Report and Order (FCC 89-106), 4 FCC Rcd 2824 (1989), *Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rule Making* (FCC 91-249), 6 FCC Rcd 5421 (1991), *Second Report and Order* (FCC 93-53), 8 FCC Rcd 907 (1993), *Memorandum Opinion and Order on Further Reconsideration* (FCC 93-54), 8 FCC Rcd 1038 (1993).

¹¹ *Notice of Proposed Rulemaking* (CC Docket No. 95-155) at ¶ 35, 10 FCC Rcd at 13701-13702 (1995).

¹² Each seven digit toll free number potentially represents approximately 2,187 different alpha-numeric combinations.

are against a subscriber being able to obtain it. When a subscriber asks its RespOrg (usually also its carrier) for a particular number, the request can be honored only if: (a) the number is in the common SMS database pool of unreserved numbers, or (b) the number has been reserved by the customer's carrier and not yet released back to the pool.¹³ If the number is in reserved status by another carrier, this information may never be known to the subscriber or the subscriber's RespOrg. If private transfers are prohibited, the subscriber may never have any opportunity to obtain the desired number. This is not to say that there is an absolute right to any number a subscriber may desire, but the ability of two private citizens to negotiate a commercial arrangement for the transfer of a legitimately assigned number should not be artificially prohibited by regulation.

12. A long-standing cornerstone of Commission regulatory policy has been that uses of telecommunications services and facilities that are privately beneficial without being publicly detrimental should not be prohibited.¹⁴ Although this precept is usually invoked against a carrier seeking to restrict some potentially competitive use of its service, the policy should be no less applicable to the Commission's own regulatory actions. When two private parties determine that it is privately beneficial for them to enter into a transaction providing for the transfer of an already assigned and working toll free number, the Commission should not prevent them from doing so in the absence of a demonstrated public harm.

C. NUMBER "INVENTORIES" AND INACTIVE NUMBERS OFTEN REPRESENT LEGITIMATE USE RATHER THAN "HOARDING".

13. The Commission defines "hoarding" as "the acquisition by a toll free subscriber from a Responsible Organization of more toll free numbers than the toll free subscriber intends to use for the provision of toll free service." *2nd R&O*, Appendix C, Section 52.107(a), *to be codified as* 47 C.F.R. § 52.107(a). Hoarding is prohibited on the following theory: "If a subscriber refuses to release numbers that are not in use, the pool of available numbers decreases. This will exacerbate toll free number depletion" *2nd R&O* at ¶ 38. While few would defend the practice of stockpiling toll free numbers that

¹³ Even then the carrier has an incentive to withhold the number from a subscriber requesting it so that it may be used as a perquisite for a larger account.

¹⁴ *E.g.*, *Atlantic Richfield Co.*, 3 FCC Rcd 3089, 3092 (1988); *Hush-a-Phone Corp. v. U.S.*, 238 F.2d 266 (D.C. Cir. 1956), *on remand*, 22 FCC 112 (1957); *Carterfone*, 13 FCC2d 420, 439, *recon. denied*, 14 FCC2d 571 (1968).

the holder never intends to use, the Commission's definition of hoarding is unnecessarily vague and therefore potentially encompasses within its scope legitimate activities that serve the public interest.

14. Toll free subscribers often engage in practices that, on the surface, might be mischaracterized as hoarding, but which actually serve legitimate business needs and public service goals. The *2nd R&O* does not adequately address these needs. The Commission states: "[T]o the extent telemarketing service bureaus are performing legitimate services, and not merely buying and selling numbers, such activity would not be considered 'hoarding'." *2nd R&O* at ¶ 40. In the same breath, however, the Commission states "that routing multiple toll free numbers to a single subscriber will create a rebuttable presumption of hoarding or brokering," and that "the amount of calling of a particular number and the rate at which a particular subscriber changes toll free numbers" will also be considered in determining whether a toll free subscriber is hoarding. *Id.* But to simply assume that an unused number is being hoarded is to ignore the realities of the industry.

15. There are any number of legitimate situations in which a quantity of toll free numbers must be maintained by a single subscriber, numbers might be frequently changed from one user to another, and/or one or more toll free numbers may, for long periods of time, not sustain actual traffic in any significant volume. Just a few examples are:

- Telemarketing service bureaus must have numbers available for immediate assignment to new clients or projects. Upon conclusion of a particular marketing campaign, the number must be retired for a period of time before it is recycled back into use by another client, lest straggling calls from the old project interfere with the new. This requires that additional numbers must be on hand for assignment to new projects while the old numbers are being aged.
- Bundled service providers have a similar need for an inventory of numbers so that they may respond promptly to new requests for service.
- Shared use vendors require long lead in times to launch a viable service. After obtaining the desired number, the developer must complete a business plan and arrange for financing. Then the developer must begin the tasks of advertising the service and negotiating with potential shared users.
- Marketing campaigns require long lead times for such things as printing catalogs and promotional literature, arranging for advertising, etc.
- A proprietary toll free brand marketed by a single firm rather than being offered to shared users, e.g., 1-800-FLOWERS, also requires significant lead time to secure investors, arrange financing, advertise and market, etc.

- Toll free numbers used for seasonal marketing campaigns or other periodic activities and functions will have long periods of legitimate inactivity. For example, mail order catalogs may specialize in products used in only a particular season. Charitable telethons will actively use their number for a relatively short period each year. Some functions may involve even less frequent heavy use, e.g., numbers associated with Olympics activities.

16. The particular telephone number to be used is a crucial part--and sometimes the most crucial part--of these services. Users typically obtain their numbers at the beginning of the process, and can not wait until they are ready to actually start using the number. It would make little sense to do all the preparatory work (planning, financing, advertising, marketing, etc.) for 1-800-WIDGETS, for example, only to then find out that the number is unavailable. The number must therefore be secured *before* the expenditure of resources to develop its use, and this of necessity will translate into initial periods of inactivity on the number. Early acquisition is even more critical in the case of vanity numbers to guarantee their continued availability when the operation is finally launched. Business realities, therefore, often require subscribers to acquire and activate toll free numbers well in advance of their actual use. This need will be even greater in light of the Commission's reduction of the reserved and assigned lag time intervals.¹⁵

17. The Commission should clarify the anti-hoarding provisions by expressly acknowledging and approving the legitimacy of end users maintaining number inventories for use in various telecommunications and other services using toll free numbers.

D. THE COMMISSION SHOULD CLARIFY AND/OR MODIFY ITS POLICIES AND REGULATIONS TO REMOVE THE ANTICOMPETITIVE ADVANTAGE CONFERRED ON LARGE CARRIERS.

18. ICB is concerned that the *2nd R&O* potentially places legitimate end users at a competitive disadvantage vis-à-vis large carriers with whom they are often in competition, both for access to numbers and in their business operations. As the Commission is aware, most RespOrgs are also carriers, and virtually all large carriers are also RespOrgs. There is an inherent tension and conflict of interest in these dual roles. RespOrgs are charged with fairly assisting users, on a nondiscriminatory basis, in acquiring numbers. But as competing business entities, they have every incentive to, and often do, take advantage of their knowledge of, access to, and control over numbers to their own advantage.

¹⁵ The new rules provide that a toll free number may be held in reserved status for a maximum of 45 days (reduced from 60 days), *2nd R&O* at ¶ 50, and that a number may remain in assigned but inactive status a maximum of 6 months (down from 12 months). *Id.* at ¶ 51.

This includes the obvious, namely, carrier's manipulating the process to obtain valuable vanity numbers for their largest and most lucrative customers.¹⁶ But it also includes situations in which carriers, either directly or through affiliates, also act as end users. If both a carrier and a non-carrier decide to establish an 800 brand and launch a telemarketing business, the carrier will have a substantial competitive advantage in terms of number acquisition.

19. Carriers can and do exploit the process as much than end users. For but one example, the Commission need only study MCI's erstwhile 1-800 MUSIC NOW venture. The campaign was publicly launched in November of 1995, only to be abandoned by MCI a year later as a business failure. Thus, MCI has had no legitimate need for the unique vanity number, 1-800 MUSIC NOW, since December of 1996. Nonetheless, the number (which it is unlikely MCI initially obtained from the common database on an equal-to-all first come, first serve basis), still has not been released. The number, as of this date, is still active and answered by a recording for MCI's general long distance services--as do, no doubt, several other numbers. Before accepting without judgment the cries of carriers that the numbers are being depleted by end user practices, the Commission must scrutinize the activities of the carriers and RespOrgs themselves.

The Commission has, in theory, blessed a first-come, first-serve toll free number allocation scheme; but in reality, it has defeated this purpose by providing a gaping loophole to the anti-warehousing provisions. Because the large carriers are invariably also RespOrgs, they have an inside track on number acquisition. This competitive imbalance is aggravated by the fact that the carrier/RespOrgs have the apparent ability effectively to warehouse numbers with the Commission's blessing. The Commission imposes anti-hoarding rules on end users, and is ostensibly even-handed in imposing anti-warehousing rules on carriers, but then inexplicably sets a permanent cap on reservations that effectively allows a carrier/RespOrg to warehouse large quantities of numbers. "RespOrgs may reserve either 2000 numbers or 7.5 percent of a RespOrg's working numbers, whichever is greater." *2nd R&O* at ¶ 80. The Commission's intention in this regard is not entirely clear. For example, a number may not be reserved in the first instance unless the RespOrg has "identified subscribers for whom they are

¹⁶ In focusing only on the "sale" of numbers, the Commission has overlooked the various ways in which the carriers and RespOrgs themselves traffic in numbers to the competitive disadvantage of end users.

reserving those numbers," *Id.* at 22, lest the RespOrg be guilty of prohibited "warehousing" of toll free numbers. Thus, the cap could be referring to those numbers subject to the 45 day maximum reservation period. But the Commission also disclaims any "inten[tion] to impose a cap that restricts a RespOrg's ability to reserve numbers to meet its subscribers' needs." *Id.* at 79. This might imply that the cap is intended to define a quantity of numbers for each RespOrg that are exempt from the anti-warehousing requirement that they be associated with an identified subscriber. Regardless of which way the "cap" provision is interpreted, it clearly places end users at a distinct competitive disadvantage, and one that is made worse by the threat of potential enforcement actions for "hoarding" against users that are merely maintaining legitimate inventories of numbers during service ramp-up periods.

20. If the Commission is truly desirous of a first-come, first-serve policy, its implementation will require that RespOrgs who are also carriers not be permitted to hold large quantities of unused numbers out of the common database pool for any significant length of time. The competitive incentive to hold valuable numbers is too great, and there is no legitimate need for such condoned warehousing. Moreover, by having numbers released more promptly back into the common database pool, they will be available to *all* RespOrgs, thereby increasing the ability of the industry to accommodate subscriber requests for particular numbers. A carrier should be treated just like any other end user in this regard, *i.e.*, it should be permitted to inventory only the numbers currently and legitimately needed to provide its services. The cap adopted by the Commission far exceeds this requirement.

21. Without paying adequate attention to the ability, incentive, and demonstrated history of carriers' using their RespOrg status to exploit the number allocation system to the disadvantage of users, the Commission stated: "If a subscriber hoards numbers, that subscriber's service provider must terminate toll free service because hoarding is contrary to the public interest." *2nd R&O* at ¶ 42. The Commission must immediately reconsider or clarify this statement. Carriers should not have the unsupervised power to determine whether a subscriber is hoarding and to mete out sanctions. This would make the carrier, who certainly has a conflict of interest and may even be in direct competition with the user, the police, prosecutor, judge, and jury. This is an untenable situation. The Commission must therefore reconsider or clarify this provision to make clear that a carrier may not terminate a subscriber for

alleged hoarding without prior notice to that subscriber and an opportunity for the subscriber to have the matter heard and ruled on by the Commission.

22. The Commission must, in reviewing the *2nd R&O*, take into full account and provide for the inherent conflict of interest and anticompetitive incentives arising from the dual roles of RespOrg and carrier. It must also recognize that carriers and RespOrgs are not always acting in those roles, but sometimes also act as end users in direct competition with other end users. The Commission's policies must therefore assure that the unique knowledge of and access to the SMS data base enjoyed by carriers and RespOrgs is not used to the competitive disadvantage of other end users.

D. CONCLUSION.

WHEREFORE, for all the foregoing reasons, it is respectfully requested that the Commission reconsider and clarify the *2nd R&O* as suggested above.

Respectfully submitted,

ICB, Inc.

A handwritten signature in black ink, reading "Robert J. Keller", with a horizontal line underneath.

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